

IN THE SUPREME COURT OF OHIO

State ex rel. Preterm Cleveland, et al.,

Relators,

v.

David Yost, Ohio Attorney General, et al.,

Respondents.

Case No. 2022-0803

Original Action in Mandamus

**BRIEF OF AMICI CURIAE
DAVID NIVEN, MIKAELA SMITH, DANIELLE BESSETT,
ALISON NORRIS, MARIA GALLO, AND STEPHEN MOCKABEE
IN SUPPORT OF RELATORS**

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INTRODUCTION

It is clear, indeed it is beyond serious dispute, that a majority of Ohioans support abortion rights. In poll after poll, the majority of Ohioans have consistently expressed the opinion that abortion should be legal in the state of Ohio. This opinion is stable and developed: it endures regardless of variations in how and when survey questions are asked and even in the face of changing legal and legislative actions. And it reflects a common experience among Ohioans: a majority of Ohioans have a family member or friend who has had an abortion, or have had an abortion themselves.

The law at issue in this case, S.B. 23—which imposes a ban on abortion as early as six weeks, before many women are even aware of a pregnancy—is therefore emblematic of a disconnect between the broadly-held beliefs and values of Ohioans and the state’s policymaking process. Instead of reflecting the Ohioan majority view that supports abortion rights, S.B. 23 caters to the minority fraction of Ohioans that are unsupportive of these rights.

INTEREST OF AMICI CURIAE

Amici curiae are academic scholars and researchers based in Ohio who teach and write in the fields of public opinion, representation and elections, and reproductive health and abortion care. They share an interest in ensuring that Ohio’s abortion laws accurately reflect the will of the people of Ohio.

Amicus David Niven, Ph.D. is an associate professor in the School of Public and International Affairs at the University of Cincinnati who studies elections and representation. Dr. Niven has published numerous peer-reviewed articles on voting, public opinion, and matters of representation. *See, e.g.,* Niven, David, *Aversive Racism at the Ballot Box: A Field Experiment on the Effects of Race and Negative Information in Local Elections*, Social Science

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Amicus Danielle Bessett, Ph.D. is an associate professor of sociology at the University of Cincinnati who studies sociology of reproduction. She co-leads the Ohio Policy Evaluation Network (OPEN), an interdisciplinary research program that studies the impacts of reproductive health-related policies and laws on the health and well-being of Ohioans. Dr. Bessett has published many peer-reviewed papers on patient experiences with reproductive processes, disparities in access to prenatal and abortion care, and knowledge and opinions about reproductive health. *See, e.g.,* Chakraborty, Payal, *et al.*, *How Ohio's Proposed Abortion Bans Would Impact Travel Distance to Access Abortion Care*, 54:2 Perspectives on Sexual and Reproductive Health 54–63 (2022); Bessett, Danielle, *et al.*, *Does State-level Context Matter for Individuals' Knowledge about Abortion, Legality and Health? Challenging the 'Red States v. Blue States' Hypothesis*, 17:6 Culture, Health & Sexuality: An International Journal for Research, Intervention and Care 733–746 (2015).

Amicus Alison H. Norris, M.D., Ph.D. is an epidemiologist in The Ohio State University Colleges of Medicine and Public Health who studies access to contraception and abortion and knowledge and stigma about sexual and reproductive health topics. She is the Co-Principal

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Amicus Maria F. Gallo, Ph.D., is professor and chair of epidemiology and associate dean of research in the College of Public Health at The Ohio State University. Dr. Gallo has published peer-reviewed articles on knowledge of abortion legality and beliefs about abortion safety in Ohio and the U.S. *See, e.g., id.; Hood, Robert B., et al., Comparison of Abortion Incidence Estimates Derived From Direct Survey Questions Versus the List Experiment Among Women in Ohio, 17:6 PLOS One (2022).*

Amicus Stephen T. Mockabee, Ph.D. is an associate professor and the director of the Graduate Certificate in Public Opinion and Survey Research in the School of Public and International Affairs at the University of Cincinnati who studies public opinion, voting, and religion and politics. Dr. Mockabee has published peer reviewed papers on public opinion, survey research methods, and cultural politics. *Improving Public Opinion Surveys: Interdisciplinary Innovation and the American National Election Studies, 278–298 (John Aldrich and Kathleen M. McGraw eds., Princeton University Press 2011); Bishop, George F., and Mockabee, Stephen T., Comparability of Measurement in Public Opinion Polls, 4:6 Survey Practice (2011).*

STATEMENT OF THE FACTS AND CASE

Amici Curiae hereby adopt and incorporate by reference the Statutory Framework and Procedural Background and the Factual Allegations in Support of Claim delineated by Relators, Preterm-Cleveland, *et al.* See Relators' Compl. at ¶¶ 43–84.

ARGUMENT

I. **PROPOSITION OF LAW: S.B. 23 IS CONTRARY TO THE WILL OF THE MAJORITY OF OHIOANS.**

A. **A Majority of Ohioans Consistently Support Abortion Rights**

Polling data consistently shows that a majority of Ohioans support abortion rights. In the last three years, three major statewide polls of Ohioans conducted by universities inquired into respondents' views on abortion. See Suffolk University, *The Suffolk University Poll, Ohio Midterm Elections with USA Today Network, Marginals*, <http://bitly.ws/sqMc> (June 7, 2022) (“the Suffolk University Poll”); Baldwin Wallace University, *The Baldwin Wallace University Great Lakes Poll, In partnership with Oakland University and Ohio Northern University*, <http://bitly.ws/sqMj> (Oct. 9, 2020) (“the Baldwin Wallace University Poll”); Quinnipiac University, *Ohio Voters Oppose Fetal Heartbeat Abortion Ban, Quinnipiac University Poll Finds; 90 Percent Support Universal Gun Background Checks*, <https://bit.ly/3y02tjU> (July 26, 2019) (“the Quinnipiac University Poll”). In all three polls, a majority of Ohioans expressed support for abortion rights.

The Suffolk University Poll

The Suffolk University Poll found that 53.4% of respondents supported abortion rights.¹ Suffolk University Poll at 5. *See also* Suffolk University, *Poll Shows Ohio Voters Want Abortion Rights Protected*, <http://bitly.ws/stt8> (June 5, 2022). The Suffolk University Poll was conducted in partnership with *USA Today*. Suffolk University, *The Suffolk University Poll, Ohio Midterm Elections with USA Today Network*, <https://bit.ly/3ypU4Ig> (June 7, 2022). This statewide survey of 500 likely midterm voters in Ohio was conducted May 22-24, 2022, using live telephone interviews of households. *Id.* Inspired by reports that the U.S. Supreme Court was poised to overturn *Roe v. Wade*, the Suffolk University Poll asked the following question: “If *Roe v. Wade* is overturned by the Supreme Court, how should your Ohio state legislators manage the issue for Ohioans?” Suffolk University Poll at 5. Available responses included: “Ohio state legislature should restrict abortions in Ohio” and “Ohio state legislature should protect abortion rights in Ohio.”² *Id.* The majority of respondents (53.4%) favored protecting abortion rights, while only 39.2% supported restricting abortions. *Id.* While the Suffolk University Poll question was prompted by recent news reports, the underlying results are

¹ The margin of sampling error for results based on the total sample was +/-4.4 percentage points. Suffolk University, *The Suffolk University Poll, Ohio Midterm Elections with USA Today Network*, <https://bit.ly/3ypU4Ig> (June 7, 2022).

² The other available responses were “Undecided” and “Refused.” Suffolk University Poll at 5.

remarkably consistent with the previous statewide polls discussed below that were conducted in Ohio over the previous three years and also showed majority support for abortion rights.

The Baldwin Wallace University Poll

The Baldwin Wallace University Poll similarly found that 51.3% of respondents supported abortion rights.³ Baldwin Wallace University Poll at 53. The Baldwin Wallace University Poll was conducted in partnership with Oakland University and Ohio Northern University. *Id.* at 2. This statewide survey of 1,009 registered, likely voters was conducted between September 30 and October 8, 2020, with an invited online sample. *Id.* The poll asked Ohio respondents: “Which of the following statements comes closest to your views on abortion?” *Id.* at 53. A majority of respondents (51.3%) said abortion should “always be legal” or “be mostly legal.” *Id.* In contrast, a minority of respondents (38.4%) said abortion should be “mostly illegal” or “always be illegal.” *Id.* Only a fraction of respondents (13.6%) declared support for banning abortion, responding that “abortion should always be illegal.” *Id.*

The Quinnipiac University Poll

The Quinnipiac University Poll found that 55% of Ohioans supported abortion rights.⁴ Quinnipiac University Poll at 5. The Quinnipiac University Poll of 1,431 registered voters in Ohio was conducted July 17-22, 2019, using live telephone interviews of landlines and cell phones. *Id.* at 2. The poll asked a very similar question as the Baldwin Wallace University Poll and came to a very similar result. *Id.* at 5. This poll asked: “Do you think abortion should be legal in all cases, legal in most cases, illegal in most cases, or illegal in all cases?” *Id.* A

³ The margin of sampling error for results based on the total sample was +/-3.1 percentage points. Baldwin Wallace University Poll at 2.

⁴ The margin of sampling error for results based on the total sample was +/-3.2 percentage points. Quinnipiac University Poll at 2.

majority (55%) selected legal in all or most cases. *Id.* In contrast, only 37% of respondents said that abortion should be illegal in most or all cases. *Id.* Similar to the Baldwin Wallace University Poll, only 10% responded “abortion should be illegal in all cases,” showing extremely low support among respondents for banning abortion. *Id.*

The Quinnipiac University Poll also asked respondents if they “support or oppose banning abortion after a fetal heartbeat is detectable, which is usually around 6 weeks of pregnancy?” *Id.* at 6. Once again, the majority of respondents expressed support for abortion rights: 52% saying they opposed banning abortion after a fetal heartbeat is detectable. *Id.* Only 39% of respondents expressed support for such a legislative measure. *Id.*

* * *

These poll findings that show the majority of Ohioans support abortion rights are consistent with the findings of academic experts. Smith and colleagues found in their peer-reviewed study of abortion opinions that 53% of Ohio women of reproductive age were largely supportive of abortion, and an additional 30% expressed some level of mixed support. Smith, *Opinions About Abortion Among Reproductive-Age Women in Ohio*, Sexuality Research and Social Policy 1 (2021). The researchers also found that while only 28% of respondents identified as Pro-life, the plurality (41%) of respondents identified as Pro-choice. *Id.* at 5.

Thus, public opinion polls and surveys in Ohio in recent years have consistently shown that the majority of Ohioans support abortion rights.

B. The Poll Findings are Reliable Evidence of Ohioans' Well-Developed Opinions in Support of Abortion Rights

The Suffolk University Poll, the Baldwin Wallace University Poll, and the Quinnipiac University Poll should be understood as providing an accurate reflection of Ohioans' opinions in support of abortion rights for several reasons.

First, the three polls were conducted by universities. Polls conducted by college and university survey research centers are considered among the most reliable sources for gauging public opinion. The objective of a university poll is to accurately measure public sentiment rather than to advance the interests of a corporate or campaign client. Moreover, university polls draw upon a unique well of survey research expertise within the faculty and staff of their respective institutions. As such, these surveys tend to follow best practices in sampling procedures, question writing, and question order to maximize the reliability of the data. *See* Cassino, Dan, *et al.*, *Are Polls Becoming Equal?*, Paper presented at the 64th Annual Conference of the American Association for Public Opinion Research, <https://bit.ly/3nm3MVC> (2009). Furthermore, a powerful test of survey reliability is to compare election poll results to actual election results. In this respect, Cassino and colleagues found that “academic surveys came out on top” as they were the most likely to show “no deviation from election results.” *Id.* at 5593.

Second, all three polls revealed consistent results. The Suffolk University Poll, the Baldwin Wallace University Poll, and the Quinnipiac University Poll showed consistent majority support by Ohioans for abortion rights. When survey results vary widely in response to repeated questions or minor changes in question wording, or vary widely when the same question is asked by different organizations, it may indicate that the respondents lacked developed opinions, and thus responded erratically based on momentary, fleeting thoughts. *See generally* Zaller, John, & Feldman, Stanley, *A Simple Theory of the Survey Response: Answering Questions Versus*

Revealing Preferences, 36:3 American Journal of Political Science 579–616 (1992). What we see here, in stark contrast, is consistent support for abortion rights—regardless of how the question is worded, which organization asked the question, or what proximate legal or legislative event prompted the polling in the first place. With all of these differences, the results remain largely the same, suggesting that the polled Ohioans are sharing their well-developed beliefs and preferences on abortion rights.

Third, the respondents to the polls were likely speaking from personal experience or knowledge. The Suffolk University Poll found that 58.6% of Ohioans said “yes” when asked if they “personally know a family member or friend who has had an abortion.” Suffolk University Poll at 5. Indeed, abortion is relatively common in the United States, with nearly one in four women having had an abortion by the age of 45. Jones, Rachel K., & Jerman, Jenna, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107:12 American Journal of Public Health, 1904–09 (2017), <https://bit.ly/2ULHK1I>. As Smith and colleagues note in their peer-reviewed study of abortion opinions among Ohio women aged 18–44 years,⁵ knowing someone who had an abortion or having had an abortion oneself is associated with increased likelihood of supporting abortion rights. Smith, *Opinions About Abortion Among Reproductive-Age Women in Ohio*, Sexuality Research and Social Policy 1 (2021). That majority support for abortion rights was consistent over time and across polls reflects that most Ohioans are speaking from some measure of personal exposure to abortion.

⁵ The study, conducted in 2018–2019, utilized a population-representative survey of 2,356 women in Ohio between the ages of 18–44 years and was administered by the NORC of the University of Chicago, an independent, non-partisan research institution. Smith, *Opinions About Abortion Among Reproductive-Age Women in Ohio*, Sexuality Research and Social Policy 1–2 (2021).

Thus, the polling data from the Suffolk University Poll, the Baldwin Wallace University Poll, and the Quinnipiac University Poll provide trustworthy and reliable evidence that the majority of Ohioans support abortion rights.

CONCLUSION

Despite Governor DeWine's claim that "Ohio is a pro-life state," Fletcher Keel, '*Ohio is a pro-life state*': *DeWine speaks on Roe v. Wade document leak*, WLWT5, <https://bit.ly/3A8wT6v> (May 3, 2022), there exists in Ohio a well-established, regularly articulated majority support for abortion rights and extremely low support for banning abortion. While abortion attitudes arise out of a complex combination of interlocking feelings toward gender, religion, politics, morality, science, and many other facets, S.B. 23 allows for none of this nuance. Instead, it supports only the narrowest anti-abortion viewpoints held by a minority of Ohioans. As Smith and colleagues observe, "[t]he relatively high amount of support for abortion in Ohio highlights an inconsistency between opinion and Ohio's restrictive legislative landscape." Smith, *Opinions About Abortion Among Reproductive-Age Women in Ohio*, *Sexuality Research and Social Policy* 1 (2021).

The dangers of legislating to meet the preferences of a small minority are clear. When the connection between the beliefs and preferences of the people and the decisions of government are lost, we have, in the words of James Madison in *The Federalist No. 48*, not a democracy but "elective despotism," in which government power is used against the people rather than on their behalf. The laws of Ohio must be responsive to the people of Ohio, and their well-established support for abortion rights.

Dated: June 30, 2022

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